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UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 28

International Association of Heat & Frost
Insulators and Asbestos Workers, Local Union
76,

Petitioner,

and

Classic Industrial Service Inc.,

Employer.

NLRB Case No. 28-RC-201988

**PETITIONER'S OPPOSITION TO
EMPLOYER'S REQUEST FOR
REVIEW**

The Union hereby submits its Opposition to Classic Industrial Service, Inc.'s ("Classic," "Employer," or the "Company") Request for Review of the Regional Director's Decision and Certification of Representative.

I. INTRODUCTION

The Regional director properly found that David Trevino (“Trevino”), Juan Godoy (“Godoy”), and Jose Gonzalez-Flores (“Gonzalez-Flores”)¹ are each statutory supervisors. All three foremen responsibly direct welders, metal mechanics, and insulator mechanics. Because the decision of the Regional Director was not made in error, there is no basis for review under Section 102.67(d)(2).

II. ARGUMENT

A. THE REGIONAL DIRECTOR DID NOT ERR IN FINDING TREVINO, GODOY, AND GONZALEZ-FLORES ARE STATUTORY SUPERVISORS

1. Foremen are Statutory Supervisors who Responsibly Direct

The Regional Director concluded each of three employees were supervisors based on their ability to responsibly direct employees (Decision and Certificate of Representation (“Decision”) at 3-5). “Responsibly direct” means “[i]f a person on the shop floor has ‘men under him,’ and if that person decides ‘what job shall be undertaken next or who shall do it,’ that person is a supervisor, provided that the direction is both ‘responsible’ . . . and carried out with independent judgment.” *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691 (2006). Direction is ‘responsible’ if the alleged supervisor:

is to be answerable for the discharge of a duty or obligation.’ . . . In determining whether ‘direction’ in any particular case is responsible, the focus is on whether the alleged supervisor is ‘held fully accountable and responsible for the performance and work product of the employees’ he directs.

Id.

¹ To aid in understanding the transcript, Mr. Gonzalez-Flores is known also as “Cadaver.” 32:17-25.

[T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor [1] the authority to direct the work and [2] the authority to take corrective action, if necessary. It also must be shown that [3] there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

Id. at 692. As demonstrated on the record, foremen responsibly direct their employees using independent judgment.

a. Foreman Have Authority to Direct Work

The evidence established that foremen direct the duties of mechanics and welders. 22:14-18.² Foremen order mechanics to accomplish various tasks. *See* 27:19-28:2. According to Josh Jonas (“Jonas”), the Employer’s own witness, foremen direct their crew, ensure they are following the specifications and doing the job properly. 270:1-14. While the general foremen or superintendents tell the foremen the general plan for the day, the foremen decide which person on his crew does what. *See* 252:16-253:13. As a part of each foreman’s self-devised game plan, they decide who is going to do the work and how it will get done. 323:20-324:2. The evidence is clear that foreman direct the work of the employees on their crew.

b. Foreman have Authority to Take Corrective Action if Necessary

Foremen supervise workers and make sure the job is done properly. 160:5-8. Foremen are responsible for making sure the work delegated to them by the general foremen gets completed and finished. 227:8-15; 244:16-18. To make sure the job is done properly foremen have the authority to take corrective action. This includes correcting work if a mistake has been made. *See* 33:8-12. If metal is not properly installed, for example, the foremen can direct the metal workers to remove it and reinstall. *See* 96:18-21. The evidence is clear that foremen direct their employees and may take corrective action if work is not done correctly.

² All references are to the transcript unless otherwise noted.

c. Foreman May be Disciplined if their Team Does Not Get the Work Done

If the foremen do not follow through with the general foreman's general plans for accomplishing work, the foreman can be disciplined. 31:2-15. The Company acknowledged that if a foreman has a pattern of not getting work done, he can be demoted. 245:6-19. It is clear that foreman can be disciplined if his crew does not properly complete the work assigned for the day.

d. Foremen's Direction is Carried Out with Independent Judgment

Direction is carried out with independent judgment if the individual may "act, or *effectively recommend action*, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare, Inc.*, 348 NLRB at 693 (emphasis added). However, such judgment must be more than "of a merely routine or clerical nature." *Id.* An assignment is routine or clerical in nature and does not implicate independent judgment "[i]f there is only one obvious and self-evident choice (for example, assigning the one available nurse fluent in American Sign Language (ASL) to a patient dependent upon ASL for communicating), or if the assignment is made solely on the basis of equalizing workloads" *Id.* Here, the foreman's exercise of judgment does not involve making decisions that are self-evident or based on the need to equalize workloads.

The decisions foremen make are based in part on their ability to understand the big picture of a particular project. 263:25-264:14. Foremen are measured on their ability to understand their work, in addition to their ability to physically do the work they direct. 245:20-246:2. A part of understanding the work includes possessing the necessary ability, intelligence, training, discretion, and experience to effectively interpret and read blueprints. 245:20-248:4. Using their overall knowledge, foremen must decide where to place each employee, a decision which is not based on Company rules or the direction of someone higher than the foreman. *See*

28:5-17. These decisions are based on independent evaluations of different employees' abilities. *See* 28:18-20.

Foreman use their assessment of employees' abilities to exercise independent judgment in solving problems that arise. Foremen have the ability to freely recommend a solution to an unexpected problem, such as if "the grid [a foreman is] laying out for some reason is not fitting into what needs to be done" 248:5-17. Foremen are not required to go to somebody else before freely recommending to a superintendent a solution to the problem. *See id.* Once the plan is set determined, the foreman decides which employees will carry out the different work necessary to carry out the plan.

Sometimes, plans, including a foreman's crew, change during the course of the day. *See* 252:16-253:15. In those instances, the foremen must develop a game plan for how to direct the employees to get the job done, much like a coach. 253:5-25; 270:19-271:6. There are no Company rules that dictate how foremen are to direct the team; each foreman exercises their own discretion. *Id.* This kind of judgment and discretion is neither implementation of an obvious or self-evident choice nor making an assignment based solely to equalize workloads. It involves being assigned a project, with various and changing crew members, and then being able to effectively delegate the work based on an *independent* evaluation of the data—who is present, the problem at hand, what needs to get done, and how much time there is to complete the work. If the foreman's efforts are not successful, they can be disciplined. 254:1-13. Foremen exercise independent judgment in responsibly directing employees that renders them supervisors under the Act.

B. THE CASE LAW RELIED ON BY CLASSIC IS INAPPLICABLE TO THE FACTS IN THIS CASE

Classic relies on *Shaw Inc.*, 350 NLRB 354, n.9 (2007) for the proposition that “assigning employees according to their known skills is not evidence of independent judgment.” (Request for Review at 8). There are two main reasons why this analysis is inapplicable. First, the hearing officer and Regional Director concluded Trevino, Godoy, and Gonzalez-Flores were supervisors based on “responsibly directing” employees, not on assigning employees (Hrg. Ofc’s Report on Challenged Ballots (“Report”) at 8-9; Decision at 4-5), as was being evaluated in this portion of *Shaw*. Second, “known skills,” as was referenced in *Shaw*, differs from what was presented here. In *Shaw*, “known skills” referred to whether a worker was, for example, a welder, operator, or a fuser. *Shaw Inc.*, 350 NLRB at 355-56. Assignment was automatically based on the trade of each worker. “For example, if an operator is part of a crew, he will operate the heavy equipment, a fuser will fuse plastic pipe, and a welder will handle metal pipe. Such assignments do not involve the exercise of independent judgment.” *Id.* Here, in contrast, each foreman directed a particular set of workers of the same trade. Trevino was a foreman over welders. 94:12-18; 209:7-16; 279:12-16. Godoy directs metal workers. 96:2-9. Gonzalez directs insulators. 34:25-35:3. In contrast to *Shaw Inc.*, where a foreman assigned workers based on their trade, here, foremen had to use their independent judgment to decide how to best direct workers of the same trade. The decision on how to direct employees here is not as simple as, “employee A is a welder so he will do welding; employee B is a metal mechanic, so he will work with metal.” Foremen here evaluated employees’ abilities, evaluated the problem at hand, and decided how to best get the job done. Therefore, *Shaw Inc.* does not apply.

Second, the portion of *Shaw* that dealt with the issue of direction of work is distinguishable. Whereas in *Shaw*, crews for a particular day were predetermined (350 NLRB at 354), here, the crews foremen have in the afternoon oftentimes are not the same crew they started with in the morning. 253:5-13. Plans change daily and throughout the day, so foremen are constantly making decisions on how to direct each different crew based on the circumstances arising throughout the day. Instead of merely following instructions provided by management,

here, foremen act as coaches, exercising their own discretion and judgment of workers' abilities to develop and implement a game plan on how to direct employees' work. Compare *Shaw*, 350 NLRB at 356 with 253:16-25. Whereas there was no finding that the employees in *Shaw* used independent judgment, here foremen use their own judgment in making decision about how to direct employees, without needing to first confer with their superiors on how to direct them. 248:5-17. Foremen also use their own independent judgment to diagnose when the general plan set by superintendents may be faulty. 248:10-249:7. Foremen are then free to effectively recommend a solution to the problem. *Id.* The scope of duties and the responsibly provided to foremen here are considerably more vast than in *Shaw*. *Shaw* also highlighted the unusual circumstances where the persons who were actually responsible for getting the work done were the superiors of the putative supervisors. *Shaw* 350 NLRB at 356. Here, it is the foremen who are responsible for making sure work gets done by those below them in the hierarchy; if they do not, the foremen can get disciplined. 254:1-13.

Employer also argues that *UPS Ground Freight Inc.*, 365 NLRB No. 113 (July 27, 2017) is applicable (Request for Review at 8). However, that case focused on supervisory status based on assigning work—not on responsible direction. *Id.* at *4-12. There was no analysis on responsible direction.

Employer relies on *Volair Contractors, Inc.*, 341 NLRB 673 (2004) for the proposition that “assigning tasks to his crewmembers with reference to a blueprint provided by management” is not independent judgment (Request for Review at 8). However, again, this goes to the question of assigning work, not directing work. In *Volair*, the putative supervisor merely followed instructions as set out on blueprints without evidence of the use of independent judgment. Here, in stark contrast, foremen must decide where to place each employee, a decision not based on Company rules or the direction of someone higher than the foreman. *See* 28:5-17. Foremen's directions are based on independent evaluations of different employees' abilities. *See* 28:18-20. The Employer's own witness acknowledged that sometimes plans, including the composition of a foreman's crew, change during the course of the day. *See* 252:16-253:15. In those instances,

the foremen must develop a game plan for how to direct the employees to get the job done, much like a coach. 253:5-25; 270:19-271:6. There are no Company rules that dictate how foremen are to direct a crew; each foreman exercises discretion. *Id.* The evidence shows a much more dynamic environment for foremen in this case than in *Volair*.

For similar reasons, the Employer's reliance on *Electrical Specialties, Inc.*, 323 NLRB 705 (1996) is misguided. There, the only evidence discussed regarding the direction of work was that the putative supervisors directed work based on specifications. *Id.* at 706. This is in contrast to the present case, where, in addition to directing work based on specifications (270:1-14), foremen decide which person on their crew performs particular tasks. *See* 252:16-253:13; 323:20-324:2. The evidence is clear that, here, foreman direct the work of their employees.

Employer's reliance on *SR-73 and Lakeside Avenue Operations LLC*, 365 NLRB No. 119 (Aug. 17, 2017) is similarly misguided. There, the Board found there was no responsible direction because the putative supervisor was not accountable for the direction of others. *Id.* at *4-5. The Board refused to credit the putative supervisor's vague statements that she considered herself responsible for employees and that she was informed she was responsible for them. *Id.* at *5. Here, Employer's own management witness testified that if foremen do not ensure their crew completes the work, they can be demoted from a foreman back to a mechanic position. 245:6-19. Luis Lopez, who was a foreman when he recently quit, testified he as a foreman could have been disciplined if he did not follow through with the general foreman's general plans. 31:2-15.

Employer attempts to discredit its own witness's testimony as "speculative" in the Request for Review (Request for Review at 11). To the contrary, Bergeron is the Company's Director of Craft Resources and Training Development. 197:20-22. He is responsible for "[training] programs for the resources of Classic and also administer[s] them and then also I'm over the construction managers where we do evaluations, individual development plans, and performance review." 197:23-198:3. He is intimately aware of how foreman are evaluated and what can happen if they fail to perform as expected. He testified that if a foreman had a pattern of not ensuring work was getting done, "there would be an evaluation as to what this foreman

actually knows and how he performs his work.” 245:6-11. Based on that evaluation, the foreman could be demoted. 245:12-15.

Our case is more similar to *Weathershield Inc.*, 2010 NLRB Reg. Dir. Dec. LEXIS 169, in which group leaders “moved employees around to different jobs to meet production needs and to ensure orders are complete and accurate.” *Id.* at *41-42. This, in combination with being accountable for work being done resulted in a finding that the group leaders responsibly directed others. *Id.* at *43.

1. Trevino, Godoy, and Gonzalez-Flores are Foremen, and thus Supervisors under the Act

The Union had the burden to prove with detailed, specific evidence that these employees are foremen and supervisors under the Act. *See Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Here, specific evidence was presented that each of these individuals are foremen and have the authority to responsibly direct employees.

The evidence, including the testimony of the Employer’s own witnesses, demonstrate that foremen possess the authority to direct work, take necessary corrective action, can be disciplined if their crew’s does not get done, and exercises independent judgment in directing employees’ work. *Supra* Part II.A.1

a. Dave Trevino

It is undisputed that Trevino is a welder foreman. 94:12-18; 209:7-16; 279:12-16. He supervises welders by giving orders on a daily basis. 25:19-26:12. He informs welders of which of the different units at the plant they will be working. 25:19-22. As a foreman, he actually helped supervise Luis Lopez who was also a foreman at the time of that supervision. 28:25-29:18; 95:9-13. If an employee makes a mistake, Trevino has to correct their work. *See* 33:8-12. Trevino lines up work for the welders and directs them on what to do and where to go. 280:13-281:1. In sum, Trevino is “a person on the shop floor” with “men under him,” who decides who

will do which job. *See Oakwood Healthcare*, 348 NLRB at 691. He is a foreman who responsibly directs, and is therefore a supervisor.

b. Juan Godoy

It is undisputed that Juan Godoy is a foreman. 95:25-96:4; 209:7-18; 282:22-23. He supervises metal workers and ensures they are properly completing work. 96:2-9. He provides measurements to the metal workers and makes sure the metal is properly installed. 96:14-17; 99:2-4. If metal is not properly installed, he can direct the metal workers to remove it and reinstall. *See* 96:18-21. He decides which individuals work at a particular location. 98:24-99:1. He makes sure his crew knows what they are doing and lines up the work for his crew. 282:22-283:10. He directs helpers on what to do and where to go. 324:24-325:4. The evidence is clear that Godoy is a foreman who directs others' work. Godoy is "a person on the shop floor" with "men under him," who decides who will do which job. *See Oakwood Healthcare*, 348 NLRB at 691. He is a foreman who responsibly directs, and is therefore a supervisor.

c. Jose Gonzalez-Flores

It is undisputed that Gonzalez-Flores is a foreman. 151:1-17; 209:7-17; 290:23-291:5. He reviews blueprints and scope of work and directs his crew. *See* 291:1-5. He directs insulators on which of the different units they will work. *See* 34:25-35:3. He decides where to direct insulators to work based on an assessment of their strengths. 36:2-4. If mistakes are not caught by Gonzalez-Flores, the general foreman notifies him of mistakes, and then Gonzalez-Flores takes action to have his workers fix it. 32:17-33:17. If his crew does not properly complete work he can be instructed by management over the radio to correct it. 36:5-16. He directs helpers on what to do and where to go. 324:24-325:2. The evidence is clear that Gonzalez-Flores is a foreman who directs others' work. He is "a person on the shop floor" with "men under him," who decides

who will do which job. *See Oakwood Healthcare*, 348 NLRB at 691. He is a foreman who responsibly directs, and is therefore a supervisor.

III. CONCLUSION

As the Regional Director did not error in concluding Trevino, Godoy and Gonzalez-Flores are supervisors, there is no basis for review. The Union requests the Employer's Request for Review be denied.

Dated: November 7, 2017

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**PROOF OF SERVICE
(CCP §1013)**

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On November 7, 2017, I served the following documents in the manner described below:

PETITIONER'S OPPOSITION TO EMPLOYER'S REQUEST FOR REVIEW

- ☐ (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.
- ☒ (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from lhull@unioncounsel.net to the email addresses set forth below.
- ☐ (BY PERSONAL DELIVERY) I caused such envelope to be delivered by hand to the offices of each addressee below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on November 7, 2017, at Alameda, California.



Lara Hull